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September 14, 1998

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

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SEP 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Notice of Ex Parte Communication Regarding Interconnection and Resale
Obligations Pertaining to Commercial Mobile Radio Services,
CC Docket 94-54

Notice of Ex Parte Communication Regarding AirTouch Communications'
Petition for Declaratory Ruling Regarding Exclusive Wireless Resale
Agreements, WTB/POL 97-1

Dear Ms. Salas:

On Friday, David Gross and I met with John Cimko and Nancy Booker of the Policy Division in the Wireless Telecommunications Bureau regarding the above referenced proceedings. We discussed the chilling impact the resale requirement has on CMRS carriers seeking to offer innovative prices and services and urged the Division to retain the narrow scope of the rules currently in place. The points included in the attached summary were also made.

Please do not hesitate to contact me if you have any questions. I have hereby submitted two copies of this notice for each of the referenced proceedings to the Secretary as required by the Commission's rules.

Sincerely,

A handwritten signature in cursive script that reads "Pamela Riley".

Pamela J. Riley

cc: John Cimko
Nancy Booker

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OVERVIEW

- The FCC's PCIA Decision not to forebear from enforcement of the resale rule was primarily based upon three assumptions.
 - That there are "unserved and underserved market segments, such as individual consumers and small business in particular ethnic communities, that may not receive sufficient marketing attention from underlying CMRS licensees" but which are materially benefited by the services provided by resellers.
 - That resellers exert real "downward pressure on rates" and create substantial innovative service offerings.
 - That resale is important because it permits new PCS entrants to begin offering service before building out their facilities.
- AirTouch believes that these assumptions are not correct.
- Lower wireless rates, increased consumer penetration, and service innovation have been driven by facilities-based competition.
 - FCC's Second and Third Reports to Congress.
 - Basis for 5 year sunset to resale rule, recently upheld by the Court of Appeals.
 - Commission has invited petitions that could, on a market-by-market basis, "sunset" the resale rule even earlier than 2002.
- Value-adding resellers will survive and prosper without special regulatory help.
 - Those resellers that are able to find special niche markets or provide services better at lower rates help facilities-based carriers expand their markets and therefore do not need special government assistance as their success is based upon adding real value.

- Facilities-based broadband CMRS carriers actively seeking new customers, including new subscribers achieved through resale.
- Lots of wireless capacity, including ability to purchase and compete via PCS.
- Contrary to what resellers have been telling the Commission, today resellers are telling the public that “the advent of PCS also bodes well for wireless resale in terms of more competitors seeking effective distribution channels and greater network capacity.” (See www.tra-dc.org/wireless_resale/wireless)
- Paging resellers constitute about 37% of the market, yet resale is not mandated by the FCC.
- AirTouch actively seeking to serve all potential customers in its markets. More resellers have agreements with AirTouch than with any other facilities-based carrier.
- Resellers often primarily seek to serve existing, large markets — not “unserved and underserved communities.” Contrary to what they have been suggesting to the Commission, the reseller association is now telling its members that their:

“initial choice of markets should be limited to large population centers. The reason is simple economics. Major population areas have the greatest number of potential customers, and will allow the reseller to reach profitability in the shortest period of time. In addition, since cellular service began first in larger markets, customers in these markets are more in-tune with the benefits of wireless and require less education before the sale.” (Id. emphasis added.)

In fact, by definition resellers can only serve those geographic areas that are already being served by the facilities-based

carrier. Those market segments within those large markets who are already “more in-tune with the benefits of wireless” and who “require less education before the sale” are clearly not the “smaller and underserved markets” that the Commission has been led to believe were the focus of resellers.

- Contrary to what they have been suggesting to the Commission, the reseller association is now telling the public that both pricing flexibility afforded to facilities-based CMRS providers and additional capacity being created by new facilities-based entrants such as PCS providers help resellers. Specifically, resellers are publicly stating that:

“The elimination of tariff-based rate regulation coupled with numerous facilities-based competitors desiring cost-efficient and effective means of distribution should provide resellers with something they rarely had in the past – meaningful bargaining power.” (Id.)

RECONSIDERATION PETITIONS

- The Commission should limit its resale rule to only common carrier services and not apply it to CPE.
 - CPE market is highly competitive. Facilities-based carriers should not have to subsidize their competitors by being required to provide below-cost CPE to competitors.
 - All covered wireless services would remain subject to resale policy until sunset.
 - Substantial Title II jurisdictional issue for the Commission regarding the sale of CPE. CPE subsidies are not the same as service discounts. Reseller (Worldcom, MCI, etc.) bargaining power with CPE vendors is no different than facilities-based operators.
- Supports PCIA's requested clarification that Section 20.12 prohibits only "unreasonable" restrictions on resale.
- Consistent with the Commission's PCIA decision, the FCC should reemphasize the narrow scope of the resale rule.
 - A narrow, clear rule minimizes litigation costs and confusion.
 - The Commission has long held that facilities-based carriers do not have to provide specific billing arrangements to resellers.
 - No requirement that facilities-based carriers offer resellers specific types of bills. Resellers have publicly admitted that "[c]urrently, there are many third-party billing solutions available to resellers." (Id. emphasis added.)

AIRTOUCH'S PETITION FOR A DECLARATORY ORDER

- Optional exclusivity is in the public interest because it serves consumers.
 - Petition seeks approval for only those rate differentials that are not coercively large. Such an option cannot be “unreasonable.”
 - By definition this type of optional exclusivity cannot be a restriction on resale as it applies only to services that always will be resold – it just allows for a lower rate to be offered by facilities-based carriers and accepted by resellers.
 - Lower carrier rates mean the potential for resellers to offer lower consumer prices.
 - Lower rates can be offered because of economic efficiencies such as more accurate network capacity planning, less churn, and lower marketing costs.
 - Pro-competitive, as allows resellers choice of pursuing different business strategies (i.e., large incumbent multi-carrier resellers offering consumers many wireless choices vs. new entrant, aligned resellers that compete by offering consumers lower prices).
- Optional exclusivity is common and pro-competitive, as demonstrated by the long distance industry.
 - FCC decision finding optional exclusivity to be a violation of Commission’s resale policy would affect the long distance industry too, as FCC’s resale policy also applies to it.
 - Use of optional exclusivity by long distance industry is marketplace evidence that there are economic benefits to optional exclusivity and that it is not a mere substitute for higher traffic volume requirements.

- Optional exclusivity does not impermissibly “lock up the existing customer base” just as long term contracts do not unlawfully “lock up” customers.
 - Long term contracts are lawful and in the public interest because they offer lower rates in return for “locking in” customers.
 - There is no practical difference between a reseller agreeing to a long term, volume discount that functionally commits it to purchase all of its airtime requirements -- which is pro-competitive and undoubtedly lawful -- and optional exclusivity.
- Resellers have recognized that a “carrier’s willingness to extend a favorable rate often is dependent upon volume, exclusivity, and credit terms. Because of the non-discrimination and resale obligations imposed on incumbent local exchange carriers [sic], these factors will be the basis on which carriers will discriminate lawfully among purchaser [sic]” (Id.)
- Optional exclusivity is consistent with FCC legal precedent.
 - AT&T CIID Card Decision, 7 FCC Rcd 7730 (1992).
 - Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562, 4566-67(1995)(individualized contract terms are not discriminatory where generally available to similarly situated customers).

MANDATORY DIRECT INTERCONNECTION FOR COMPETITIVE WIRELESS CARRIERS

- Before taking action that is inconsistent with its preliminary finding that government-mandated direct reseller interconnection would not be in the public interest, the Commission must seek further comment because the record is stale.
 - Comments and replies in this proceed were submitted in 1995.
 - Since then, there have been material changes in the industry and the law that need to be considered.
 - Congress enacted the Telecommunications Act of 1996, including Section 251, which applies to CMRS reseller interconnections.
 - In 1996, the Commission issued its First Report and Order, 11 FCC Rcd 15499(1996), regarding interconnection matters generally and CMRS interconnection issues specifically.
 - The Commission has recently found that “substantial progress has been made towards a truly competitive mobile telephone marketplace.” That progress has been largely made since 1995. Chairman Kennard and Congressional leaders of both parties have recently described the wireless telephone industry as already “the exemplar of fierce competition.”
- Any decision to impose direct interconnection requirements on CMRS providers without re-opening the record to take further comment on the material changes both in the law and in the marketplace would violate the APA and would be unlawful.

- A decision by the FCC to order mandatory direct interconnection requirements by competitive, facilities-based wireless carriers would be contrary to prior FCC decisions and policies, as well as the Communications Act and Congressional intent.
- First Report and Order, 11 FCC Rcd at 15991 at para. 997 (“direct interconnection ... is not required under section 251(a)” for telecommunications carriers such as CMRS providers. Rather, Section 251(a) permits a carrier to satisfy its obligations by interconnecting either “directly or indirectly” at the carrier’s option.)
- Would be directly counter to the FCC’s “actions [that] have substantially relieved CMRS providers from the most burdensome aspects of common carrier regulation. We believe these deregulatory actions have contributed significantly to the impressive growth of competition in CMRS markets.” (PCIA Decision at 5.)
- Would mire FCC and carriers in difficult, expensive, and time-consuming issues about unbundling and rate regulation, inconsistent with a competitive market.
 - Resellers have positioned the “reseller switch” proposal as economic only if there is government-mandated network unbundling and rate discounts.
- Would be inconsistent with the FCC’s resale policy which “does not require [CMRS] providers to structure their operations or offerings in any particular way”
- Would have a substantial, adverse impact on CMRS network quality and control by facilities-based licensees.
 - Does not relieve carrier of functions such as call recordation, call validation, call routing, or billing recordation.

- Increases carrier costs through increased responsibility for provisioning, administration, and maintenance.
- Will make it materially more difficult for carriers to accurately forecast traffic and plan needed capacity change.
- Increases risks of call blockage for all customers, including customers of the facilities-based carrier, if reseller facilities are inadequate.
- Adverse impacts because of the potential for multiple, nonstandard connections.
- Call set up times for the public would be increased.